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November 17, 2008

VIA HAND DELIVERY

Honorable Chief Justice and Justices of the California Supreme Court
California Supreme Court
350 McAllister Street
San Francisco, California 94102

RECEIVED

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CLERK SUPREME COURT

Re: *Strauss, et al. v. Horton, et al.*
City and County of San Francisco, et al. v. Horton, et al.
Tyler, et al. v. State of California, et al.
Asian Pacific American Legal Center, et al. v. Horton, et al.
California Supreme Court Case Nos. S168047, S168078, S168066,
and S168281

**Amici Curiae Letter in Support of Petition for Extraordinary Relief,
Including Writ of Mandate and Request for Immediate Injunctive Relief**

To The Honorable Ronald M. George, Chief Justice of California, and the Honorable Justices of the California Supreme Court:

Pursuant to California Rule of Court 8.500(g), Sacramento Lawyers for the Equality of Gays and Lesbians, joined by law student groups from Pacific McGeorge School of Law in Sacramento (Asian Pacific American Law Student Association, Black Law Students Association, Jewish Law Students Association, Lambda Law Students Association, Latino American Law Students Association, Middle Eastern South Asian Association, and Women's Caucus), Loyola Law School, Los Angeles (ACLU at Loyola Law School and OutLaw), Santa Clara University School of Law (Asian Pacific American Law Students Association, Bisexual Gay and Lesbian Advocates, La Raza Law Students Association, ACLU at Santa Clara University School of Law, National Lawyers Guild, and Public Interest and Social Justice Coalition), Stanford Law School (OUTLAW), University of California, Berkeley, School of Law (Boalt Hall Committee for Human Rights, Filipino American Law Society, and UC Berkeley Law Queer Caucus), University of California, Davis, School of Law (American Constitution Society, Black Law Student Association, Humanitarian Aid Legal Organization, Jewish Law Students Association, Lambda Law Students Association, La Raza Law Students Association, Middle Eastern/South Asian Law Students Association, National Lawyers Guild UC Davis Law School Chapter, and The Feminist Forum), University of California, Hastings College of Law (Hastings OutLaw), and the University of Southern California, Gould School of Law (USC OUTLAW) (collectively "amici") respectfully implore this Court to exercise original jurisdiction over these cases. In addition, we respectfully request that this Court stay the enforcement of Proposition 8 until these

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cases are heard and this Court makes a final determination. We make this request based on the inherent serious conflict between Proposition 8 and the guarantee of equal protection in the California Constitution. That conflict risks inflicting imminent and grave harm on California citizens unless it is resolved by this Court as soon as possible.

Introduction

Proposition 8 writes discrimination against a suspect class of citizens into the California Constitution. This mandate that same-sex couples be treated differently under the law is in direct conflict with the Equal Protection Clause. *See* Cal. Const., art. I, sections 7(a)-(b). By passing Proposition 8, a bare majority of California voters created the above-referenced serious conflict in the California Constitution. These cases present an urgent question concerning that conflict which we respectfully believe this Court should exercise original jurisdiction to resolve.

Furthermore, this serious conflict prevents this Court from doing its job. This Court held in the *In re Marriage Cases* that discrimination based on sexual orientation deserves strict scrutiny. *In re Marriage Cases* (2008) 43 Cal. 4th 757, 840-841. Proposition 8 requires this Court to ignore its holding and allow the ban on same-sex marriage to be reinstituted. This Court will be forced to selectively apply equal protection principles to those alleging discrimination based on sexual orientation. If Proposition 8 is permitted to become law, discrimination barring same-sex couples from exercising their fundamental right to marry will be tolerated even if the government cannot show a compelling state interest. Equal protection for suspect classes should not be guaranteed for some fundamental rights, but not for others. The application of Proposition 8 will create such a distortion of equal protection law.

Interest of the Amici Curiae

We stand together as minority bar associations and minority law student organizations to fight this kind of discrimination and to promote and achieve equality for our respective communities and for all Californians. We are united in promoting the general principle of advancement of equal protection and fundamental rights for all individuals under the California Constitution. We write to this Court both as current members of the bar and as future officers of the court, each with our own unique duties to fulfill.

Some of us are current members of the bar, and as lawyers we are called upon to promote the cause of justice while upholding human rights and fundamental freedoms recognized by law, and when those freedoms are threatened we stand up for and protect those fundamental rights. We cannot stand idly by while a fundamental right is stripped away from a protected class of people. Our duty as current members of the bar compels us to take all appropriate action to ensure that equal protection is guaranteed for everyone in California. That duty compels us to reach out to this Court today when we see the equal protection guarantee of the California Constitution imminently threatened by the passage of Proposition 8. As this Court ruled in *Legislature v. Eu*, original jurisdiction is appropriate when issues presented before this Court are of "great public importance and should be resolved promptly." *Legislature v. Eu* (1991) 54

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Cal.3d 492, 500 (quoting *Raven v. Deukemjian* (1990) 52 Cal.3d 336, 340). We believe that preserving the guarantee of equal protection for *all* Californians is of great public importance and indeed the conflict in the California Constitution should be resolved promptly.

Some of us are law students and future officers of the court, and we hold sacred the interest of protecting the rights of minorities and upholding fundamental rights for the next generation of Californians. When it is apparent an injustice has occurred, we ask ourselves if this is the sort of injustice that our court system can resolve. Through our legal education, we have learned that taking away a fundamental right from a protected class and removing the guarantee of equal protection is such an injustice. Our duty as present and future officers of the court compels us to take all appropriate action in order to ensure that everyone in California retains the fundamental right to marry the person of their choice. It was this Court that stated "the essence of the right to marry is freedom to join in marriage with the person of one's choice..." *Perez v. Sharp* (1948) 32 Cal. 2d 711, 717. That freedom is threatened by the inherent conflict between the passage of Proposition 8 and the equal protection guarantee in the California Constitution. As future officers of the court it is our duty to ask this Court to quickly resolve the conflict and protect Californians from imminent harm.

A Bare Majority Cannot Strip Away a Fundamental Right Guaranteed by the Equal Protection Clause of the California Constitution

Six months ago, this Court recognized that the California Constitution protects marriage as a fundamental right for *all* Californians, including same-sex couples who are a suspect class and entitled to strict scrutiny. *In re Marriage Cases*, 43 Cal. 4th at 781. This Court reasoned that limiting marriage to opposite-sex couples constitutes sexual orientation discrimination and thus violates the California Equal Protection Clause. *Id.* at 856-57. This Court held that same-sex relationships are "accorded dignity and respect equal to that accorded other officially recognized families." *Id.* at 783.

Nearly six months later, Proposition 8 trampled upon that "dignity and respect" and also trampled upon those same-sex couples by stripping away a fundamental right. *Id.* The passage of Proposition 8 allowed a bare majority of the popular vote to take away the rights of a suspect class of citizens. Such a stripping of rights by a simple majority was the type of systemic behavior that James Madison warned against in 1789 when he said:

The prescriptions in favor of liberty ought to be leveled against that quarter where the greatest danger lies, namely, that which possesses the highest prerogative of power. But this is not found in either the Executive or Legislative departments of Government, but in the body of the people, operating by the majority against the minority.

James Madison proposing the Bill of Rights to the House of Representatives, June 8, 1789, available at http://www.jmu.edu/madison/center/main_pages/madison_archives/quotes/supremacy.htm.

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In this case, the majority has indeed operated against the minority and stripped away the fundamental right to marry, which is guaranteed equally to all people by the California Constitution. That is just the sort of great danger Madison identified nearly 220 years ago, and just the sort of great danger that the Equal Protection Clause of the California Constitution is designed to protect against. If the majority can take away fundamental rights from a minority by popular vote, then what other rights could be implicated and which other minority groups could be targeted? Perhaps opposite-sex couples who are unable to procreate could be told by a bare majority that they no longer have the right to marry? If a bare majority can change the California Constitution and take away this Court's right to oversee the guarantee of equal protection, then the tyranny of the majority may have only just begun.

**The Court Can Prevent Irreparable Harm to Californians by
Staying the Enforcement of Proposition 8 Until the Court Hears
These Cases**

In addition, we know that same-sex couples who have not yet had the chance to marry could suffer irreparable harm if this Court does not stay the enforcement of Proposition 8 while resolving the conflict between passage of the proposition and the California Constitution's guarantee of equal protection. While some may argue that granting such a stay would change the status quo, we respectfully point out that adding discrimination based on minority status to the language of the California Constitution is the real change in the status quo. Article I, section 7(a) of the California Constitution provides that a person may not be "denied equal protection of the laws...." And Article I, section 7(b) states that "[a] citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens." The California Constitution has guaranteed equal protection for all individuals for over 150 years and allowing that to be changed could cause immediate and irreparable harm to Californians. Because of this possibility of irreparable harm we respectfully call upon this Court to stay the enforcement of Proposition 8 until this Court can hear these cases and resolve the existing conflict in the California Constitution.

**The Court Has a History of Accepting Original Jurisdiction in
Cases Involving Ballot Measures**

Indeed, this Court has a history of being willing to accept original jurisdiction to hear and correct abuses of the initiative process. See *Brosnahan v. Brown* (1982) 32 Cal.3d 236, *Amador Valley Joint Union High School Dist. v. State Bd. Of Equalization* (1978) 22 Cal.3d 208, *Raven v. Deukmejian* (1990) 52 Cal. 3d 336, and *Legislature v. Eu* (1991) 54 Cal.3d 492. In *Raven*, this Court overturned an initiative that implicated fundamental constitutional rights of California prisoners, including rights to due process and equal protection. *Raven*, 52 Cal.3d at 352-54. The initiative also limited the Court's authority to interpret the California Constitution in a manner more protective of defendants' rights than the United States Constitution. *Id.* This Court found that the central purpose of the equal protection guarantee in the California Constitution is to protect minority groups from the majority, calling it a "preexisting fundamental principle of

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constitutional jurisprudence.” *Raven*, 52 Cal.3d at 354. “The judiciary, from the very nature of its powers and means given to it by the Constitution, must possess the right to construe the Constitution in the last resort....” *Id.* (quoting *Nogues v. Douglass* (1858) 7 Cal. 65, 69-70). While the Court must uphold the will of the people, it also must retain its role as the final arbiter of equal protection and it should not allow voters to exceed their constitutionally-granted power. That is why it is so important for the Court to exercise original jurisdiction in this case.

Conclusion

We lawyers and law students are firmly united in standing up for equal protection and fundamental rights. Although we certainly acknowledge that this is a difficult issue that has divided Californians, a primary purpose of this Court is to protect minority groups from the tyranny of the majority. Doing so is not always easy, but we are encouraged by the words of the late Senator Robert F. Kennedy, carved into his gravestone at Arlington National Cemetery:

It is from numberless diverse acts of courage and belief that human history is shaped. Each time a man stands up for an ideal, or acts to improve the lot of others, or strikes out against injustice, he sends forth a tiny ripple of hope, and crossing each other from a million different centers of energy and daring, those ripples build a current that can sweep down the mightiest walls of oppression and resistance.

Sen. Robert F. Kennedy, Day of Affirmation Address, University of Cape Town, Cape Town, South Africa, June 6, 1966, *available at* <http://www.rfkmemorial.org/lifevision/selectedquotes/>.

Today we join together, as attorneys from minority bar associations and members of minority law student organizations, as current and future officers of the court from throughout this great state, to stand up for equal protection and fundamental rights as we send forth such a ripple of hope. Throughout our state’s history, this Court has protected the rights of unpopular minorities against the whims of the majority. This Court helped sweep down the walls of oppression and resistance sixty years ago in *Perez v. Sharp* by finding that prohibiting interracial marriages was inconsistent with the fundamental constitutional right to marry even though statutory prohibitions on interracial marriage existed since the founding of our state. This Court once again helped sweep down those walls six months ago when it held that Proposition 22 violated the Equal Protection Clause of the California Constitution. *In re Marriage Cases*, 43 Cal. 4th at 854. A bare majority of California voters put those walls back up earlier this month. However, those walls cannot stand when they are built upon the foundation of removing equal protection from a minority group and taking away the right of this Court to uphold the Equal Protection Clause of the California Constitution.

In order to once again sweep down those walls, restore “dignity and respect” to same-sex couples (*In re Marriage Cases*, 43 Cal. 4th at 783), and preserve the role of this Court in upholding fundamental rights and equal protection for all Californians, we respectfully request

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that this Court exercise original jurisdiction to resolve the serious conflict in the California Constitution caused by Proposition 8 as quickly as possible. We also respectfully request that this Court stay enforcement of Proposition 8 to prevent the likelihood of irreparable harm until such time as these cases have been heard and this Court makes a final determination.

Respectfully submitted,

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PROOF OF SERVICE

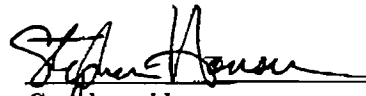
I, Stephen Hansen, declare that I am over the age of eighteen years and I am not a party to this action. My business address is 980 Ninth Street #2180, Sacramento, CA 95814.

On November 17, 2008, I served the foregoing documents described as **Amici Curiae Letter in Support of Petition for Extraordinary Relief, Including Writ of Mandate and Request for Immediate Injunctive Relief** on the parties in these actions by serving:

[X] **BY MAIL:** I am readily familiar with the business practice for collection and processing correspondence for mailing with the United States Postal Service. I know that the correspondence was deposited with the United States Postal Service on the same day this declaration was executed in the ordinary course of business. I know that the envelopes were sealed, and with postage thereon fully prepaid, placed for collection and mailing on this date, following ordinary business practices, in the United States mail at Sacramento, California.

INTERESTED PARTIES:**SEE ATTACHED SERVICE LIST**

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct; that this declaration is executed on November 17, 2008, at Sacramento, California.


Stephen Hansen

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